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No. 00-1507

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,
PETITIONER

v.

KEITH MAYDAK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent attempts to portray the court of appeals' decision in this case as a fact-specific application of pre-existing legal principles. That characterization is without basis. As the petition for certiorari explains, the court of appeals has announced a wholly new mode of procedure under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. V 1999), to govern the common situation in which documents the release of which might interfere with pending law enforcement proceedings (and which are therefore protected from compelled disclosure by FOIA Exemption 7(A), 5 U.S.C. 552(b)(7)(A)), are also covered by other FOIA exemptions. Other courts of appeals, in contrast to the D.C. Circuit, have permitted an agency to invoke other relevant exemptions through an individualized review process once law enforcement proceedings have terminated and Exemption 7(A) is no longer applicable. See Pet. 10-11.

The direct effect of the court's decision in this case alone is to compel the disclosure of more than 1000 pages of grand jury materials the release of which is expressly forbidden by

law—as well as, *inter alia*, information concerning the personal privacy interests of persons who furnished information to the government. More broadly, the legal regime adopted by the court of appeals, if allowed to stand, will seriously disrupt the orderly processing of future FOIA requests for similar documents, especially since any FOIA suit may be brought in the District of Columbia, where the decision below will be binding precedent. Indeed, as we have explained (Pet. 16-18), the court of appeals' decision is already having those consequences.

Those consequences are in no way compelled by general principles of FOIA law. To the contrary, as the petition for certiorari explains (at 12-15), this Court in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), emphasized that both the text and purposes of Exemption 7(A) support a "generic" or "categorical" approach under which specified classes of records may be withheld without document-specific proof of likely interference with enforcement proceedings. Far from comporting with established principles of FOIA law, the court of appeals' decision will substantially undermine the ability of agencies to invoke Exemption 7(A) in the manner contemplated by this Court. Review by this Court therefore is warranted.

A. Respondent's discussion (Br. in Opp. 17-22) substantially understates the deleterious practical effects—both case-specific and prospective—of the court of appeals' ruling.

1. The court of appeals' decision compels the release of grand jury materials, notwithstanding the express prohibition of Federal Rule of Criminal Procedure 6(e). See Pet. 24-27. The government's declarant in this case attested that the documents responsive to respondent's FOIA request included "[g]rand jury materials consisting of a large volume of subpoenas, transcripts, and subpoenaed documents." Pet. App. 36a. Respondent has not contested that assertion, and neither the district court nor the court of appeals suggested any reason for disbelieving it.

Respondent contends that this Court has "recognize[d] the fact-specific inquiry in claims seeking the disclosure of grand jury material." Br. in Opp. 22 (citing *Douglas Oil Co.* v. *Petrol Stops N.W.*, 441 U.S. 211, 219 (1979)). That proposition has no application here, however, because grand jury materials covered by Rule 6(e) are *categorically* protected from public disclosure under the FOIA. A "fact-specific inquiry" may indeed be necessary to determine whether a private party has made the particularized showing of need required to obtain grand jury materials under one of the exceptions to the general rule of nondisclosure in Rule 6(e) itself. See *Douglas Oil Co.*, 441 U.S. at 219-224; *id.* at 222 ("Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed."). It is settled law, however, that a plaintiff's desire to acquire agency records through the FOIA is not itself the sort of "need" that can support an exception to the general rule of grand jury secrecy. See *American Friends Serv. Comm.* v. *Webster*, 720 F.2d 29, 72 (D.C. Cir. 1983); *Fund for Constitutional Gov't* v. *National Archives & Records Serv.*, 656 F.2d 856, 868-869 (D.C. Cir. 1981). The court of appeals' decision compels the disclosure of grand jury materials under the FOIA, notwithstanding the fact that respondent could not possibly have established his entitlement to those documents if the case had been remanded for further proceedings in the district court.

2. The court of appeals' decision also threatens substantial future disruption of agency efforts to process FOIA requests for documents related to a pending law enforcement proceeding. See Pet. 16-18. Respondent is incorrect in contending (Br. in Opp. 19-20) that the court of appeals' approach is sufficiently flexible to protect the government's interests in Exemption 7(A) cases. Although the court

stated in conclusory terms that "the government has mechanisms by which it can accomplish the goal of protecting sensitive information while at the same time satisfying its burden of proof with respect to other exemptions in the original district court proceedings," Pet. App. 13a, it offered no meaningful guidance on how that task could be accomplished, see Pet. 22-23. Moreover, the sort of ad hoc submissions and *in camera* reviews the court apparently had in mind would constitute a sharp departure from the use of *Vaughn* indices and other settled practices in FOIA litigation. But even if suitable alternative mechanisms were available and readily identifiable in some cases, any such flexibility in the manner of demonstrating the applicability of other FOIA exemptions to a court would do nothing to address the second danger at which Exemption 7(A)'s categorical approach is directed—*i.e.*, that contemporaneous line-by-line processing of documents in response to a FOIA request will divert agency files and personnel from the conduct of the enforcement proceeding itself. See Pet. 14-15.

Finally, the vagaries of litigation are such that an agency confronted with a FOIA request for records currently protected by Exemption 7(A) will rarely be able to predict with confidence whether that exemption will remain applicable throughout the duration of any ensuing FOIA suit. The practical impact of the court of appeals' decision is therefore not limited to situations in which the underlying enforcement proceeding actually concludes during the pendency of the FOIA case. Rather, the decision will frustrate the ability of agencies to rely on the categorical approach endorsed in *Robbins Tire* with respect to *all* FOIA requests to which Exemption 7(A) potentially applies. The decision thus flouts the Court's repeated admonitions regarding the need for "workable rules" in the FOIA context. *FTC* v. *Grolier Inc.*, 462 U.S. 19, 28 (1983); see also, *e.g.*, *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989); *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489

U.S. 749, 776-780 (1989); *FBI* v. *Abramson*, 456 U.S. 615, 623-629 (1982); *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599-602 (1982).

B. Respondent suggests (Br. in Opp. 13) that general FOIA principles compel the result reached by the court of appeals, and that the government's position in this case must therefore rest on the view that Exemption 7(A) occupies a "preferential status." That argument is misconceived. Our contention is not that Exemption 7(A) is more important than other FOIA exemptions, but simply that its application (like that of other exemptions) is to be accomplished in a pragmatic way. In particular, implementation of Exemption 7(A) must take into account that exemption's particular *combination* of features—*i.e.*, that (1) it is suitable for broad and categorical application, (2) its applicability to particular documents is especially likely to change over time, and (3) it is typically invoked when a person involved in law enforcement proceedings turns to the FOIA in an effort to circumvent limitations on discovery in those proceedings, but may well abandon that effort once the proceedings are over. See Pet. 16.[1]

1. In upholding the use of a generic approach to Exemption 7(A), the Court in *Robbins Tire* specifically contrasted that exemption to Exemptions 7(B), 7(C), and 7(D). 437 U.S.

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[1] Respondent relies on the proposition that in FOIA cases "the government ordinarily 'must raise all its claims of exemption in the original proceedings in district court, and may not thereafter assert new claims of exemption, either on appeal or on remand following appeal.'" Br. in Opp. 9 (quoting *Washington Post Co.* v. *United States Dep't of Health & Human Servs.*, 795 F.2d 205, 208 (D.C. Cir. 1986)). None of the cases that respondent cites in support of that proposition involved Exemption 7(A), and none addressed the situation presented here, where the government *prevailed* on its initial claim of exemption, but due to changed circumstances that exemption ceased to be applicable during the pendency of the litigation. Moreover, as we explain below (see pp. 9-10, *infra*), the government in this case *did* raise exemptions in addition to Exemption 7(A) with sufficient particularity in the district court. See also Pet. 18-21.

at 223-224. As we have explained (Pet. 14-15), the categorical approach to Exemption 7(A) serves both to prevent the premature disclosure of sensitive law enforcement information, and to ensure that the processing of FOIA requests does not divert government files and resources from the enforcement proceeding itself. As respondent observes (see Br. in Opp. 14 n.12), this Court has subsequently recognized that a categorical approach is sometimes also appropriate under Exemptions 7(C) and 7(D). But the fact that Exemption 7(A) is not "unique" in this respect does not detract from the importance of the objectives identified in *Robbins Tire*.

2. As the petition explains (at 2), Exemption 7(A) is temporally limited and applies to particular records only as long as a reasonable risk of interference with law enforcement persists. The situation presented in this case, where the agency determined during the pendency of the FOIA litigation that the prior danger of interference had dissipated, occurs with some frequency. The court of appeals recognized that an agency should be permitted to invoke additional exemptions at an advanced stage of a FOIA suit "where a substantial change in the factual context of the case * * * forces the government to invoke an exemption after the original district court proceedings have concluded." Pet. App. 14a. The court found that principle to be inapplicable here, however, on the ground that "the only change in this case is the simple resolution of other litigation, hardly an unforeseeable difference." *Id.* at 15a. Under that analysis, the culmination of the underlying enforcement proceeding (and the consequent inapplicability of Exemption 7(A) after that time) could *never* provide grounds for permitting the agency to invoke additional exemptions, since the eventual completion of a government enforcement proceeding will never be "unforeseeable."

The court of appeals' reasoning misses the point entirely. Precisely because the termination of law enforcement pro-

ceedings during the pendency of related FOIA litigation is a frequent and foreseeable occurrence, any workable approach to the implementation of Exemption 7(A) must take into account the exemption's temporally limited nature. As we explain above (see pp. 3-5, *supra*), the agency's practical ability to employ a categorical approach in establishing the applicability of Exemption 7(A) will be substantially negated if the agency is thereby deemed to have waived its right to prove other applicable exemptions in the event that Exemption 7(A) ceases to apply.

C. Respondent suggests (Br. in Opp. 6) that the government might have continued to rely on Exemption 7(A) throughout this litigation by invoking the principle that in FOIA cases, "court review properly focuses on the time the determination to withhold is made." *Bonner* v. *United States Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991); see also *Lesar* v. *United States Dep't of Justice*, 636 F.2d 472, 480 (D.C. Cir. 1980).[2] The fact that the government might have pursued that course, however, provides no support for the court of appeals' resolution of this case.

Under a strict application of the *Bonner* rule, the district court's judgment would have been affirmed in this case so

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[2] Respondent also asserts (Br. in Opp. 6-7) that the government might have resisted a remand on the alternative ground that Exemption 7(A) remained applicable because respondent "still had several collateral motions pending and contemplated filing several more." Exemption 7(A) applies, however, only where the production of requested records "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). In light of the Third Circuit's affirmance of the district court's denial of respondent's motion for a new trial (see Pet. App. 6a-7a, 15a), the Department of Justice concluded that the prospect of interference with any present or future enforcement proceeding was sufficiently remote that reliance on Exemption 7(A) was no longer appropriate. Whether or not the government might tenably have pursued a more aggressive course with respect to Exemption 7(A), the government's actual conduct was surely a reasonable means of implementing the statutory standard.

long as the court of appeals agreed that the pertinent documents were covered by Exemption 7(A) at the time of withholding, even if all relevant enforcement proceedings had concluded during the pendency of the FOIA suit. Respondent's only remedy at that point would have been to file a new FOIA request, subject to the potential administrative and judicial delays that such a course would entail. See *Bonner*, 928 F.2d at 1153 ("Bonner may indeed file a new FOIA request, but if he does, he will stand in line behind other FOIA requesters."). And if respondent were to file a second lawsuit challenging the agency's withholding decision, the government could, of course, raise any applicable exemption, including exemptions not raised in the earlier suit.

As a matter of policy, the government has not advocated a strict application of the *Bonner* rule in the context of Exemption 7(A). Because of the temporally limited nature of Exemption 7(A), situations will frequently arise in which the release of documents that were properly withheld under that exemption as an initial matter ceases, during the pendency of the FOIA litigation, to present a realistic danger of interference with any underlying enforcement proceeding. Forcing the courts to resolve the Exemption 7(A) issue even though the law enforcement proceeding has terminated—and then forcing the plaintiff to file a new FOIA request (and potentially a new lawsuit) under those circumstances—would result in wasted efforts by the FOIA requester, the government, and the courts. In moving for a remand in the present case, the government sought to avoid those inefficiencies. Cf. *Trans-Pac. Policing Agreement* v. *United States Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999). In practical effect, the government's position was that the district court on remand should adjudicate the case *as though* respondent had filed a new FOIA request after the prospect of interference with law enforcement proceedings had dissipated, and that any disputes arising out of that

(hypothetical) request should be resolved within the framework of the existing case.

By opposing a remand to allow the district court to rule on the applicability of other FOIA exemptions, respondent seeks to obtain the advantages of that procedure without accepting the disadvantages. As we explain above, if two sequential FOIA requests and two sequential lawsuits had actually been filed, the government, in defending against the second suit, would have been entitled to invoke all applicable FOIA exemptions, including exemptions that had not been raised in the earlier litigation. Because the purpose of the remand is to allow the case to proceed as though a second request had been filed, the government should not be disadvantaged by its willingness to accommodate the FOIA requester so as to expedite the ultimate resolution of the dispute. Cf. *Mobil Oil Corp.* v. *EPA*, 879 F.2d 698, 701 (9th Cir. 1989) (courts should hesitate to conclude that an agency's voluntary release of particular records waives FOIA exemptions as to related documents, because "[i]mplying such a waiver could tend to inhibit agencies from making any disclosures other than those explicitly required by law").

D. Respondent repeatedly states (Br. in Opp. 1, 2, 4, 12, 16) that the government did not "raise" any FOIA exemption other than Exemption 7(A) in the initial district court proceedings. With respect to additional exemptions, the agency did not perform the sort of page-by-page analysis, including the segregation of disclosable from nondisclosable material, that it would have undertaken if it had not regarded Exemption 7(A) as an independently sufficient ground for withholding.[3] The government's district court

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[3] Contrary to respondent's suggestion (Br. in Opp. 16), the record makes clear that the government did "review all of the requested documents" in this case. See Pet. App. 36a (Hull Declaration explains that the agency "conducted a document-by-document review of the documents pertaining to [respondent] and categorized them").

filings stated unequivocally, however, that substantial portions of the requested materials would be protected from compelled disclosure on grounds other than Exemption 7(A), and that the agency's primary reliance on Exemption 7(A) should not be construed as a waiver of other exemptions. See, *e.g.*, Pet. App. 45a (Hull Declaration); Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment 18-20 (Nov. 17, 1997); Reply Memorandum to Plaintiff's Opposition to Defendant's Motion for Summary Judgment 15-17 (Jan. 2, 1998).

Under those circumstances, respondent cannot plausibly claim that the agency's request for a remand to consider the very exemptions it had previously identified in the district court reflects governmental sandbagging or subjects him to unfair surprise. And as the petition explains (at 18-21), under traditional summary judgment principles, the government's district court filings created a genuine issue of material fact regarding the applicability of exemptions other than Exemption 7(A) to the documents at issue here. The existence of that factual dispute alone should have precluded the court of appeals from ordering disclosure of all responsive documents.

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For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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